

LAW OFFICES
GINSBURG, FELDMAN AND BRESS

CHARTERED
1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 637-9000

TELE X
4938614

CABLE
"LEGIS"

TELECOPIER
(202) 637 9195

CORRESPONDENT OFFICE
9, RUE BOISSY D'ANGLAS
75008 PARIS, FRANCE

WRITER'S DIRECT DIAL NUMBER

November 21, 1994

EX PARTE OR LATE FILED

RECEIVED

NOV 21 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: CC Dkt. No. 94-1 (Ex Parte Filing)

Dear Mr. Caton:

This letter, on behalf of the education coalition, answers two criticisms against the coalition's proposal that the FCC modify its existing "consumer productivity dividend" ("CPD") requirement in order to dramatically increase telecommunications infrastructure investment in the nation's schools and libraries.^{1/} Under the Commission's existing price cap rules, local telephone companies must provide a CPD to interstate carriers by pricing the access services they sell to these carriers 0.5 percent below the maximum price that otherwise would be permissible. The agency requires a modest price subsidy to interstate carriers on the theory that they might pass the benefits of the subsidy to their customers by lowering the price they charge for interstate communications ser-

^{1/} The education coalition is composed of The American Library Association, The Council of Chief State School Officers, The National Association of Secondary School Principals, the National Education Association, and the National School Boards Association. The coalition made its proposal to the FCC in written comments filed June 29, 1994 in response to the agency's request for suggestions on how to improve existing price cap rules for local telephone companies. See Notice of Prop. Rulemaking in CC Dkt. No. 94-1, 9 FCC Rcd. 1687 (1994). The Computer and Communications Industry Association made a similar proposal to the FCC in its written comments.

No. of Copies rec'd 043
List A B C D E

DAVID GINSBURG
MYER FELDMAN
J. W. ROSENTHAL
LEE R. MARKS
MICHAEL J. SANDERS, P.C.
JOEL S. BURTON
ALFRED J. EICHENLAUB
ALAN S. WEITZ
BRUCE H. RABINOVITZ
EUGENE M. PROPPER
HENRY M. RIVERA
JONATHAN GINSBURG
HARVEY J. SHULMAN
GERALD W. VESPER
EDWARD S. COGEN
DAVID B. ARMSTRONG
RODNEY L. JOYCE
JAMES E. MCNAIR
CRAIG A. EMDEN
EDWIN N. LAVERGNE
A. J. COOPER
DWIGHT D. MEIER
MARTIN J. JARON, JR.
JERAD PASTERNAK
JEFFREY A. MANITY
DANIEL P. HODIN
LYNN BONDE
SAMUEL P. KASTNER
HARRY M. GLAZER
MADONNA A. McGWIN
TIMOTHY J. JESSIEL
DAVID B. TATGE
ALAN P. VOLLMANN
GREGORY B. NUCCI

DAVID G. BRESS (308 1976)

LUANN S. SINCLAIR
JOHN E. SCHWARZ
NADINE R. GREENZAID
CRAIG A. ETTER
PETER C. GRENIER
JAY S. NEWMAN
CLAUDIA B. KOEPPPEL
KATHLEEN S. PIRRI
SAUL JAY SINGER
DOUGLAS L. GIBLEN
T. SCOTT WILKINSON
CHRISTOPHER G. MARGAND
MARK I. SIEGAL
KATHY M. MILJANIC
CHRISTOPHER D. THOMPSON
AVA L. HEALY
KEVIN LEVITAS
CLIFFORD A. WESTFALL
VICKI L. ROBINSON
KENNETH L. LE BON

OF COUNSEL
SHIRLEY Z. JOHNSON
LINDA DALLAS REIDER
JUDE ANNE CARLUCCIO
GABRIEL FINEMAN
LEONARD J. HENZKE, JR.
ALLEN K. HALPERIN
LARRY S. SOLOMON
GRAHAM G. WISNER
SUSAN A. COBB

*NOT ADMITTED IN D.C.

William F. Caton
November 21, 1994
Page 2

vice.^{2/} Importantly, the FCC did not require interstate carriers to pass through to their customers the benefits of this subsidy. Nor did the agency require that any voluntary pass-through go to any particular class of customers. And the agency did not establish any mechanism by which to determine the ultimate beneficiaries of this subsidy.

In comments filed June 29, 1994 with the FCC, the education coalition proposed a specific way in which the agency could modify its CPD requirement in order to ensure that consumers actually benefit from the CPD. More specifically, the coalition recommended that the Commission give each local telephone company a choice. The company either could continue to give interstate carriers a 0.5 percent subsidy in the price they pay for access service or it could price this service at a level which does not contain this subsidy and instead earmark for school infrastructure modernization an amount from access service revenues equal to the CPD amount. Under the coalition's plan, schools and libraries served by participating local telephone companies could pay for infrastructure modernization by drawing from this CPD account. The coalition asked that the FCC open a further rulemaking to develop implementation details.

While there has been almost no opposition to the coalition's proposal in written comments to the FCC, one recent press report quotes an unidentified "consumer advocate" as contending that the coalition's proposal constitutes an effort to convince the FCC to impose a "tax". Elsewhere, it has been asserted that the FCC does not have jurisdiction under the Communications Act to adopt this plan. Both arguments are frivolous as shown below.

I. The Coalition's Proposal Does Not Constitute a "Tax"

Adoption of the coalition's proposal would not put the FCC in the position of levying a "tax". First, the coalition proposal does not constitute a "tax" on interstate carriers. A "tax" is an assessment. The coalition has not proposed that the Commission levy an assessment on interstate carriers but instead that it eliminate a modest subsidy that the present CPD provides them.

^{2/} See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6796 (1990) (adopting existing CPD mechanism and explaining rationale for this mechanism).

William F. Caton
November 21, 1994
Page 3

Nor does the coalition's proposal constitute a tax on local telephone companies. Voluntary payments do not constitute a "tax."^{3/} As indicated above, the coalition has asked the FCC to permit, but not to require, each local telephone company to decide whether or not to participate in the plan.

The coalition's proposal also is not a "tax" because its primary purpose is to accomplish a communications regulatory objective rather than to raise revenue. Courts have held that a regulation is a tax only when its primary purpose is to raise revenue.^{4/}

II. The FCC Has Clear Authority Under the Communications Act to Adopt the Coalition's Plan

The claim that the FCC does not have jurisdiction under the Communications Act to adopt the coalition's proposal is equally ridiculous. By its express terms, the Communications Act gives the Commission jurisdiction to adopt regulatory policies which ensure that "all the people of the United States . . . [have telecommunications service provided by] adequate facilities . . . [and delivered at] reasonable charges"^{5/} In Republican Administrations, the FCC has taken numerous steps to require telecommunications providers to subsidize specific customers in order to carry out this statutory obligation. For example, in 1987 the FCC adopted rules requiring communications service providers to pay up to half of poor peoples' local telephone installation and connection charges.^{6/} In 1986, the agency adopted rules requiring communications carriers to pay all or part of the subscriber line charge for poor people living in those states which provide a

^{3/} City of Vanceburg v. FERC, 571 F.2d 630 (D.C. Cir. 1977), cert. denied, 439 U.S. 818 (1978).

^{4/} San Juan Cellular Telep. v. Pub. Service Commission, 967 F.2d 683 (1st Cir. 1992); Rural Telephone Coalition v. FCC, 838 F.2d 1307, 1314 (D.C. Cir. 1988); Brock v. Washington Metro. Area Transit Auth., 796 F.2d 481, 489 (D.C. Cir. 1986), cert. denied, 481 U.S. 1013 (1987); Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984).

^{5/} 47 U.S.C. §§ 151, 154(i).

^{6/} Link Up America, 2 FCC Rcd. 2953, 2955-59 (1987).

William F. Caton
November 21, 1994
Page 4

matching subsidy.^{7/} In 1984, it required carriers to subsidize the cost of telephone company local loops in areas where the cost of providing telephone service is substantially higher than the national average.^{8/} In 1989, the agency stated that it had jurisdiction under the Communications Act to require that carriers subsidize the cost of providing telephone relay service, a service which facilitates telephone communications by hearing impaired people.^{9/} Commission rules even require subsidized telephone rates for certain businesses. For example, for more than a decade the agency has required local telephone companies to offer subsidized rates to enhanced service providers.^{10/} The coalition's proposal -- by providing a regulatory mechanism to speed deployment of information infrastructure in the nation's schools and libraries -- is merely one more way in which the FCC can meet its statutory obligation to promote universal availability of telecommunications service.^{11/}

^{7/} Lifeline Assistance, 51 Fed. Reg. 1371 (1986), aff'd, 1 FCC Rcd. 431 (1986), modified, 2 FCC Rcd. at 2955-56, further modified, 3 FCC Rcd. 4543, 4552-53 (1988).

^{8/} Amendment of Part 67 Rules, 96 FCC 2d 781 (1984), modified, 50 Fed. Reg. 939 (1985), further modified, 2 FCC Rcd. 2953 (1987).

^{9/} Access to Telecommunications Equipment and Services by the Hearing Impaired and Other Disabled Persons, 4 FCC Rcd. 6214, 6215-16 (1989).

^{10/} Access Charge Recon. Order 97 FCC 2d 682, 715 (1983), aff'd, 6 FCC Rcd. 4524, 4534-35 (1991) (specifying an interstate access charge for enhanced service providers that is steeply discounted from the access charge that all other service providers must pay).

^{11/} In the rulemaking in which the coalition made its proposal, the FCC itself recognized that it had jurisdiction to adopt a regulatory plan along the lines of the coalition's proposal. It did this by explicitly requesting proposals for modifying the existing price cap rules in ways that would speed "development of a ubiquitous, national information infrastructure." 9 FCC Rcd. at 1693.

William F. Caton
November 21, 1994
Page 5


CONCLUSION

Contrary to recent claims, the education coalition's proposal for modifying price cap rules does not constitute a "tax", and the FCC plainly has jurisdiction under the Communications Act to adopt it.

Respectfully submitted

EDUCATION COALITION

By

A handwritten signature in dark ink, appearing to read "Henry R. Rivera", is written over a horizontal line.

Henry R. Rivera
Rodney L. Joyce

Its Attorneys